Petition

81-1264

No.

Supreme Court, U.S.
FILED
DEC 16 1981

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

EDWARD CHAMLESS FOGG, III,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether one who receives corporate funds for the express purpose of paying corporate expenses has received personal gross income upon which he is obliged to report and pay taxes.

2. Whether evidence that a corporate officer received corporate funds for payment of corporate expenses and did not report such funds on his personal income tax return is proof beyond reasonable doubt that the corporate officer wilfully evaded his personal income tax obligations.

3. Whether evidence which merely suggests the possibility of a crime may be considered proof beyond reasonable doubt on the assumption that the accused, if innocent, can prove his innocence.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Edward Chamless Fogg, III, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit (heretofore, the Fifth Circuit) entered in this proceeding on August 6, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reproduced in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 6, 1981. A timely petition for rehearing was denied on October 8, 1981. On Novem-

ber 24, Justice Powell signed an order extending the time in which to file the petition to and including December 17, 1981. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

26 United States Code Section 7201. ATTEMPT TO EVADE OR DEFEAT TAX

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution.

STATEMENT OF THE CASE

Petitioner, Edward C. Fogg, III, is a former mayor of Miami, Florida and is chairman of the board of Farm Stores, Inc., a company with more than 2,000 employees and annual sales in excess of $75,000,000 (G. Ex. 1-5). The business grew out of one started by petitioner's father. From two stores in 1957, the business grew to become 261 stores throughout South Florida (Tr. 376-86). Farm Stores sells dairy products, citrus juice and sundry items in drive-in locations.

In the early 1970s, petitioner had a conversation with one of Farm Stores' suppliers, Frank Knight, general manager of Florida Juice. According to Knight, petitioner asked for more money for orange juice sales promotion. Knight replied that he could not afford to give Farm Stores any more money. Petitioner then suggested to Knight that he

bill Farm Stores a little more than the base price for orange juice and "refund" the difference to Farm Stores each month (Knight Tr. 16). Knight agreed. Thereafter, Florida Juice added from one to two and a half cents per quart of orange juice sold to Farm Stores (Tr. Vol. III,17). At the end of each month, Florida Juice issued checks for the refund, payable to Farm Stores, and Knight, or another employee, delivered them to petitioner. This practice continued until 1977 (*Id.* 19).

Petitioner would then deliver the checks to the Farm Stores vice-president, John Rife, a CPA in charge of Farm Stores' financial and tax matters. Rife or, sometimes a subordinate, entered the checks on Farm Stores' books in an "exchange account", deposited them in Farm Stores' bank account. He contemporaneously drew a check for cash, and delivered the cash to petitioner.[1] Petitioner had told Rife that he wanted the equivalent of the Florida Juice refund checks in cash "for legitimate business expenes" (Rife Tr. 28). Rife believed him, asked no further questions and asked for no documentation of the expenses. (*Id.* at 53, 147-48)[2]

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[1]For the years 1973-1976, Florida Juice payments to Farm Stores for the rebates averaged about $80,000 per year. For 1977, they were under $4000. Checks drawn to cash and presumably paid to petitioner by Farm Stores varied significantly in amount each year, but averaged slightly more than the average of the rebates paid by Florida Juice (Tr. 417-418).

[2]Rife also testified that he prepared petitioner's personal income tax returns during the years in question, did not report as income the Florida Juice funds because he believed they were expended for corporate purposes, and that he believed that the returns he prepared were correct (Rife Tr. 60-66, 143, 147-148).

An Internal Revenue agent testified that the Florida Juice refunds were not included as income in petitioner's personal return and that a corporate officer's statement that funds were being used for legitimate business expenses would not be accepted under the Internal Revenue Laws without documentation and would be considered constructive dividends and personal income to petitioner (Tr. 454-58).

On this, and virtually nothing more, petitioner was convicted of five counts of evasion of his personal income tax for 1973-77, sentenced to thirty months in prison (five consecutive six month terms), fined $50,000, and ordered to pay half the costs of prosecution (R. 525).

Petitioner had moved, at the close of the prosecution's case, for a judgment of acquittal (Tr. 476). That motion having been denied,[3] petitioner presented only character witnesses: Steven Clark, Mayor of Dade County (Tr. 529), Richard Gerstein, former State Attorney for Dade County (Tr. 533), Henry Stanford, President of the University of Miami (Tr. 536), Jeanette Hausler, Associate Dean, University of Miami School of Law (Tr. 540); James L. Duncan, retired Bishop of the Episcopal Diocese of Southeast Florida (Tr. 544), and Ray Goode, former County Manager of Dade County (Tr. 547). The thrust of this testimony was that petitioner was an outstanding

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[3]Counts 6 through 10 of the indictment also accused petitioner of filing false corporate returns for Farm Stores. These counts were dismissed because there was no evidence that petitioner had anything to do with the returns (Tr. 480, 516).

public leader, a generous contributor to charity,[4] a leader in eleemosynary causes, a man of impeccable character and honesty.

Petitioner did not present any evidence of how he spent the funds, relying upon his motion for judgment of acquittal and his constitutional rights.

The case was tried (Tr. 482-88, 597-98, 644-65), presented to the jury (Tr. 722-23), and affirmed on appeal by the Fifth Circuit on the theory that the petitioner had the burden of proving to the jury that the funds were not personal income to him or that, if they were, he had offsetting deductions (App. 6). The prosecutor, and the Internal Revenue Agent witness, agreed that if the funds were expended for legitimate corporate expenses, petitioner was innocent (Tr. 466). The claim made to the jury, and to the court below, however, was that the defendant had the burden of proof. Petitioner's position at all times, however, was, and is, that he had no burden whatsoever until the Government proves that he had substantial amounts of unreported personal income; that proving he received corporate funds as a custodian did not begin to meet that burden.

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[4]For example, petitioner was a member of the Board of Trustees and a contributor of more than $50,000 to the University of Miami (Tr. 537-538).

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW IS FUNDAMENTALLY WRONG

The Government's theory, which permeated the trial, and which was accepted by the court below, was that it makes a *prima facie* criminal case of income tax evasion when it proves that a taxpayer had possession or dominion over funds which he did not report as income. As the court below succinctly put it, "If Fogg contends that he used the money . . . for legitimate business expenses, he must prove it" (App. 6). This makes a mockery of the Government's constitutionally required burden of producing evidence justifying an inference of guilt beyond reasonable doubt. It robs the accused of his Fifth Amendment right to insist that the Government "establish guilt by evidence independently and freely secured," *Malloy v. Hogan,* 378 U.S. 1, 8 (1964), and without benefit of inferences from his passivity, *Griffin v. California,* 380 U.S. 609, 614 (1965). It is also very bad tax law.

a. The money was not income to petitioner

If a taxpayer receives money burdened with an obligation to repay it, or as trustee, custodian or bailee, "he is not ordinarily enriched by the transaction and, therefore, does not realize any 'income' within the meaning of IRC § 61(a)." 1 Bittker, Federal Taxation of Income, Estates and Gifts § 6.1 (1981). In ignoring this basic principle, the court below created a trap for every citizen through whose hands the money of others passes. If there is a coherent difference between the position of the petitioner and that of a bank or grocery store clerk who receives customer's

money, it was not suggested below by the Government or the court. The decision below arms the Government with the awesome and heretofore nonexistent power not only to collect taxes on custodial funds but to convict the custodian of serious crime if he is unable to "document" or otherwise persuasively prove that he derived no personal benefit from the funds. Indeed, even if he can bear such a burden, producing documentation that he was a mere conduit, he may be subjected to criminal prosecution. For, even if there was a "wash" and the conduit derived no taxable income, he could still be a violator of I.R.C. § 7206(1) (filing materially false returns) for failure to include the funds as "income" in his return, with an offsetting deduction. *Cf. United States v. Taylor,* 574 F.2d 232 (5th Cir. 1978).

Ironically, even the I.R.S. takes no such absurd position, agreeing with the case law that there is no income to report if the funds were received consensually, subject to reciprocal obligations, or as trustee, bailee or conduit. See Bittker, *supra,* at § 6.2.[5]

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[5]On the rare occasions when the I.R.S. has taken the absurd position, it has lost, even in civil cases. Thus, in *Shaara v. Commissioner,* 40 Tax Ct. Mem. Dec. (CCH) 37,062(M) (T.C. July 14, 1980), the taxpayer, owner of 45% of a corporation, had suppliers inflate invoices to the corporation, then return the inflated amount in cash to taxpayer, who then paid bribes to Jersey City and Hudson County officials to get construction contracts. The Commissioner claimed that this cash was income to the taxpayer. The Tax Court held otherwise, that where the taxpayer is a mere conduit for a corporation, money passing through his hands is not reportable on his personal return. See also, *United States v. Berman,* 75 F.Supp. 789 (N.D.Ga. 1947).

Cases in which the transaction is ostensibly a loan or a custodial one but in reality the acquisition of personal enrichment, *Cf, James v. United States*, 366 U.S. 213 (1961), are easily distinguished. In *all* such cases, so far as petitioner can discern, the Government affirmatively proved beyond reasonable doubt that there was no intention on the part of the taxpayer to honor his obligations; rather, he treated the sums as unconditionally his own and derived direct personal benefit. See, *e.g., United States v. Walsh*, 627 F.2d 88 (7th Cir. 1980); *United States v. Larson*, 612 F.2d 1301 (8th Cir. 1980).

It is, of course, *possible* that petitioner diverted the rebates to his own use, in whole or in part. If so, it was the Government's duty to prove it. This could have been accomplished in myriad ways. It could be shown, for example, that petitioner deposited sums of cash approximating those received by Farm Stores from Florida Juice in his own bank account, see *United States v. Greer*, 607 F.2d 1251 (9th Cir. 1979), or accounts of family members or nominees, *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976); or that he purchased personal goods or services with the funds, *United States v. Mackey*, 571 F.2d 376 (7th Cir. 1976). Even without attempting to trace the funds, the Government could easily have proved that petitioner used large sums of cash in his personal affairs, *United States v. Daniels*, 617 F.2d 146, 150 (5th Cir. 1980), or even that his personal expenditures or net worth did not coincide with his reported income. See generally, Duke *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a*

Procedural Hybrid, 76 Yale L.J. 1 (1967). Absent any of that, the I.R.S. could have conducted a tax investigation or assessed a deficiency, and asked petitioner what he did with the funds. If he claimed a specific expenditure, and the claim was false, this could easily have been proven, and would have warranted an inference of personal income. *Cf. Zacker v. United States*, 227 F.2d 219 (8th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956); *United States v. Sclafani*, 265 F.2d 408 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959). The Government did *none* of those things. Indeed, there is no evidence that any effort whatever was made by the Government to determine how the money was expended (Tr. 503, 628). There isn't a shred of evidence that petitioner used the funds for any purpose other than that for which they were acquired—legitimate busines expenses.

The Government characterized the arrangement between Florida Juice and Farm Stores to the jury as a "kickback" scheme (Tr. 682, 686, 692, 698, 729, 731), and argued that it could have had no purpose other than income tax evasion (Tr. 681-82, 692, 722, 724, 729). There is, however, no evidence to support the argument. Rebates are common in American business, the practice becoming virtually an epidemic. The rebate here may seem unusual in that it was not in reality a price reduction; the burden of it was borne by the recipient. But that, it can be argued, is substantially true of most rebates. In any event, there are plausible business purposes for such an arrangement. By treating the matter as a "rebate," corporate funds were freed for expenditure in less visible ways than paying by checks. Criticism from hostile shareholders, em-

ployees[6] or the public could be reduced or eliminated; corporate secrets could be protected from competitors. Moreover, if the corporation wanted to make political contributions which might embarrass it (*e.g.*, if it contributed to both candidates) or the recipients, cash payments would be required.[7] Petitioner does not argue that provisions for low visibility expense funds are wholly defensible business practices, but he does claim that they are commonplace in Government, in political campaigns, and in business, and were rampant during the early 1970s.[8] One has only to recall the Watergate funds, the CIA's fiscal secrecy, the payments of corporate bribes to foreign officials, and the recently disclosed and still intact Presidential discretion-

[6]If, as is commonplace, branch or division managers are compensated in whole or in part by the profits of their division, they have motivation to challenge virtually any expenditure made by a higher executive such as petitioner, on the ground it is unrelated to their phase of the business.

[7]On December 17, 1981, petitioner filed a motion to reduce sentence in the district court. Therein, he disclosed that on August 13, 1981, he had testified before federal grand jury #80-6, sitting in Miami, concerning the Florida Juice rebates. He there testified that all the funds so acquired by him were expended as contributions to various city, county and state politicians and political candidates; none were retained by him personally. All contributees understood that the contributions were made by Farm Stores, Inc. All contributions were in cash, which was the traditional manner of making political contributions in South Florida during the early and mid-1970s. None of the contributions exceeded $500, the amount allowable under Florida law. Petitioner presented a list of 198 persons who received the contributions. Petitioner also told the grand jury that he had wanted to testify in his trial but did not do so on advice of counsel, who told him the Government had not proved a case against him.

[8]He also claims, of course, that "the business ethics or public policy involved in the payments" is irrelevant to any question before the Court. *Lilly v. Commissioner*, 343 U.S. 90, 97 (1952) (rebates by optical companies to prescribing eye-doctors).

ary fund, to realize how common they were and are.[9] Petitioner may have violated a vague fiduciary responsibility in paying corporate expenses with cash, but he did not commit tax evasion, or even fail to report personal income.

b. The decision deprived petitioner of his constitutional right to require the prosecution to produce evidence of his guilt beyond reasonable doubt

In placing the burden on petitioner to prove that he expended the funds for the purpose for which they were received, the Court below relieved the Government of its constitutional duty to prove a *prima facie* case.

It is often consistent with the Government's obligations under *In re Winship*, 397 U.S. 358 (1970), to prove, in a tax evasion case, that the accused wilfully understated his gross income by a substantial amount. It is not necessary, normally, to prove also that the accused had no offsetting, unclaimed deductions. There is no duty to produce independent proof concerning the non-existence of unclaimed deductions because there is *already* proof: the taxpayer's statement of the amount of his deductions on his return is an implied admission that there are no more. *United States v. Hornstein*, 176 F. 2d 217, 220 (7th Cir. 1949). Moreover, experience with human behavior suggests that taxpayers

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[9]See Hamilton, *Panel Backs Shift in Law Against Bribery Abroad*, Final ed., Wash. Post, Sept. 17, 1981, reporting that hundreds of American corporations had maintained "millions of dollars of slush funds used to bribe officials here and abroad." See also, Kindred, *College Football: What Price Glory?* Final ed., Wash. Post, Oct. 4, 1981, reporting that college football has become professional as a result of secret payments under the table from "slush funds." See also, note 5, *supra*.

normally take at least all the deductions to which they believe themselves entitled. *United States v. Dinnell*, 428 F. Supp. 205 (D. Ariz. 1977). There is nothing even analogous to an admission here. There isn't even a "rational connection" between petitioner's receipt of the rebates for "legitimate corporate expenses" and the Government's claim that he pocketed the money rather than paid the expenses; nothing grounded in "common experience" would suggest he did one thing and not the other. *Cf. Tot v. United States*, 319 U.S. 463, 467-468 (1943).

Petitioner has found no case holding that a taxpayer-defendant has any burden whatsoever unless the Government first proves unreported *income* or false deductions.[10] As petitioner's counsel below aptly put it, "If Fogg had taken the stand and proved that he used the money for business expenses of Farm Stores, legitimate or illegitimate, deductible or nondeductible, his testimony would have established that the money was never personal income to him and, rather than establishing an affirmative defense to

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[10]The absurdity of the decision below can be demonstrated by a hypothetical. Assume that petitioner had reported as income on his return the Florida Juice rebates, then taken deductions for the corporate expenses. Under the reasoning of the court below, the Government could make a *prima facie* case merely by *introducing petitioner's tax returns*. It would then be up to petitioner to prove his innocence by substantiating his claimed deductions. No court has ever before accepted such a notion, for it would require virtually all taxpayers to prove their innocence or go to jail. Had petitioner reported the "income" and taken a "deduction", the Government would clearly have been required to *disprove* the deduction, beyond reasonable doubt. See *Zacker v. United States*, 227 F. 2d 219 (8th Cir. 1955); *United States v. Ragen*, 314 U.S. 513 (1942). Yet if there is a difference between petitioner and the hypothetical, it is that petitioner filed a correct return (not including as income money which was *not* income), whereas the hypothetical did not.

a *prima face* case, would have established that the Government never proved a *prima facie* case." Appellant's Petition for Rehearing, p. 5.[11] Petitioner plainly had no such duty. It was unconstitutional to permit the jury to speculate about what was done with the funds.

Petitioner may have used the money for the purpose he stated to Farm Store's Vice President, John Rife. Rife believed that he had (Tr. 142-143, 147-48). Petitioner *may* have appropriated some or all of the money to his own use. Either hypothesis is plausible. It was the Government's burden, however, to prove beyond reasonable doubt that petitioner pocketed the money, and that he knew that the money was income to him and reportable on his returns. See *Sansone v. United States*, 380 U.S. 343 (1965) (elements of the offense). *In re Winship, supra,* and *Mullaney v. Wilbur,* 421 U.S. 684 (1975), require that the prosecution disprove, as part of its case, every plausible explanation or hypothesis other than guilt. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity,* 92 Harv. L. Rev. 1187, 1213-1214 (1979). *Cf. Barnes v. United States,* 412 U.S. 837 (1973).

c. The decision below stripped petitioner of his constitutional rights under the self-incrimination clause of the Fifth Amendment

In *Malloy v. Hogan,* 378 U.S. 1 (1964), this Court recognized that the self-incrimination clause of the Fifth Amendment guarantees to an accused that the evidence for his conviction "be independently and freely secured" *Id.* at 8. In *Griffin v. California,* 380 U.S. 609, 614 (1965), the

[11]This was in all respects a correct statement of the law. 1 Bittker, *supra,* at § 6.2.

Court established that the prosecution cannot buttress its case or satisfy its burden in any way by the silence of the accused. By holding that petitioner bore the burden of proving what he did with the money, the Court below denied petitioner his Fifth Amendment rights. Not only did the court unconstitutionally shift the burden to petitioner, it approved an argument to the jury that invited it to draw an adverse inference from petitioner's silence:

> ". . .[T]his case is here for one reason and one reason only. It was this defendant who committed the acts that are uncontroverted. They have not been controverted by anything that Mr. Dittmar has brought out in his closing argument. It was the defendant that put himself in question, put his own liberty in jeopardy because these is no legitimate explanation. You didn't hear one legitimate explanation for that type of conduct" (Tr. 722).

Griffin condemned any "rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." 380 U.S. at 613. Thus, it is unconstitutional for either the judge or the prosecutor to make comments which invite such adverse inferences. It is equally clear that in considering whether the prosecution has met its burden of proof, the judge may not anticipate an explanation from the accused and factor this into the balance. See Nesson, *supra*, at 1211; Duke, *supra*, at 32-33.

It will not do to suggest, as did the court below, that there is a telling difference between adverse comment on the failure of the *defense* to explain and the failure of the

defendant (App. 11).[12] Every adverse inference or adverse comment on the failure of the *defense* to explain pressures the defendant to do so, especially where, as here, there is neither evidence nor plausible argument that anyone other than the defendant could meet the prosecutor's accusations.[13] See Nesson, *supra*, at 1212. See also, *United States v. Buege*, 578 F. 2d 187, 188 (7th Cir. 1978).

Quite apart from the fact that the prosecutor's remarks pressured the defendant to testify and deprived him of much of the value of his privilege, it is inconsistent with the Fifth Amendment, as *Griffin* construed it, to permit any inference of guilt to be drawn from an evidentiary fact, here, the receipt of the rebate in cash, unless that inference can be drawn, without reference to the passivity of the accused or the defense, beyond reasonable doubt. Otherwise, the decision of the defendant not to testify or produce evidence becomes an essential part of the prosecution's case. Nesson, *supra*, at 1210.

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[12]This Court has also occasionally employed such a simplistic distinction, *e.g.* in *United States v. Gainey*, 380 U.S. 63, 71 (1965), but this was before the Court had focussed on the problem in *Griffin* and there is no indication that the matter has been fully considered by this Court.

[13]As appears from petitioner's grand jury testimony, petitioner could have given a "legitimate explanation" without testifying only if he could produce 198 politicians who would admit receiving cash contributions from him (see note 7, *supra*). That would have been an impossibility.

II

THERE IS AN URGENT NEED FOR THIS COURT TO CLARIFY THE PRINCIPLES INVOLVED IN THIS CASE

a. Production burden in tax evasion cases

It has been nearly three decades since this Court seriously considered methods and burdens of proof in income tax evasion cases. See *Holland v. United States*, 348 U.S. 121 (1954); *United States v. Calderon*, 348 U.S. 160 (1954); *Friedberg v. United States*, 348 U.S. 142 (1954); *Smith v. United States*, 348 U.S. 147 (1954). The Court in those cases recognized real risks to the innocent in circumstantial proof of income tax evasion and erected a number of safeguards to minimize such hazards. Unfortunately, the absence of review in the interim has resulted in destruction of virtually every safeguard. See Duke, *supra*, at 21-33.

Moreover, this Court's plenary consideration of circumstantial proof in tax evasion prosecutions predated its recognition of the full scope of the self-incrimination clause in *Malloy* and *Griffin*, *supra*. Thus, the Court in *Holland* denied that there were any self-incrimination problems in circumstantial proof, 348 U.S. at 138-139, even while recognizing that a "basic assumption . . . is that most assets derive from a taxable source and when this is not true the taxpayer is in a position to explain the discrepancy." *Id.* at 126. The *Holland* group of cases also long predated this Court's consideration of the meaning and underpinnings of proof beyond reasonable doubt. *Mullaney v. Wilbur*, *supra*; *Barnes v. United States*, *supra*. As this case demonstrates, moreover, courts increasingly

treat problems of proof in tax evasion prosecutions as virtually disconnected from broader principles of criminal procedure; all but indistinct from such problems on the civil side. Duke, *supra*, at 1-3, 31-33, 74-75. If permitted to stand, this case will finalize the divorce of tax evasion charges and the Bill of Rights. Review, on the other hand, will remind courts that tax evasion prosecutions are *criminal* cases.

b. Relationship of self-incrimination clause to proof beyond reasonable doubt; permissive inferences

Prior to *In re Winship, supra,* this Court seemingly considered the requirement of proof beyond reasonable doubt as little more than a cautionary admonition to the jury. *Cf. Holland v. United States, supra,* at 140 ("If the jury is convinced beyond a reasonable doubt, we can require no more."). The requirement's independent, and probably more important, function of giving content to the prosecution's production burden, was virtually ignored.[14] Thus, the Court grappled with statutory presumptions as if the only requirement were "rational connection," see, *e.g., Tot v. United States,* 319 U.S. 463 (1943); *United States v. Gainey,* 380 U.S. 63 (1965), and explicitly denied that presumptions and permissive inferences created self-incrimination problems. *Yee Hem v. United States,* 268 U.S. 178 (1925); *United States v. Gainey, supra,* at 70.

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[14]Indeed, the Second Circuit, for decades, held that the "requirement of proof beyond reasonable doubt is a direction to the jury, not a rule of evidence. . . ." *United States v. Valenti,* 134 F. 2d 362, 364 (2d Cir.), *cert. denied,* 319 U.S. 761 (1943).

There is much confusion still. The Court has apparently not yet recognized that shifting of burdens, presumptions, and permissive inferences implicates the self-incrimination clause or even that burden of proof and self-incrimination are related, although they plainly are. See Nesson, *supra,* at 1210; Duke, *supra,* at 32-33. Moreover, a majority of this Court may still believe that a "rational connection" between a proven fact and an inferred fact is all that is necessary to justify an instruction that guilt may be inferred. See *County Court of Ulster County v. Allen,* 442 U.S. 140 (1979). The Court has yet to deal with the truth that such an instruction (or argument) *contradicts* the instruction on reasonable doubt. See Nesson, *supra,* at 1205, 1208.

Unless the Court reconciles its many conflicting *dicta,* clarifies the applicable principles, and reasserts that tax evasion prosecutions are governed by them, confusion will continue and innocent defendants like petitioner will be convicted of serious crimes.

CONCLUSION

It is therefore respectfully suggested that the petition for a writ of certiorari should be granted and the decision of the court below reversed.

December 16, 1981

STEVEN DUKE
Attorney for Petitioner

GREENBERG, TRAURIG, ASKEW,
HOFFMAN, LIPOFF, QUENTEL
& WOLFF, P.A.
Of Counsel

APPENDIX FOLLOWS

Appendix

Appendix

UNITED STATES of America,
Plaintiff-Appellee

v.

Edward Chamless FOGG, III,
Defendant-Appellant

No. 80-5900.

United States Court of Appeals,
Fifth Circuit.
Unit B

Aug. 6, 1981

C. Harris Dittmar, Jacksonville, Fla., for defendant-appellant.

Atlee W. Wampler, III, U. S. Atty, Kevin M. Moore, Stephen B. Gillman, Asst. U. S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HILL and VANCE, Circuit Judges, and LYNNE,* District Judge.

LYNNE, District Judge:

This appeal concerns the amazing attempt of appellant, the corporate president of a thriving food store chain, to skim approximately $80,000 per year off the wholesale

*Hon. Seybourn H. Lynne, Senior District Judge of the Northern District of Alabama, sitting by designation.

price that his company paid for orange juice and pour it, tax-free, into his own pocket. On March 30, 1980, a grand jury, sitting in the Southern District of Florida, indicted appellant on ten counts of income tax evasion. Appellant's jury trial began on June 11, 1980. At the close of the government's case, the trial judge granted appellant's motion for judgment of acquittal on those counts charging that appellant had assisted in presenting fraudulent corporate tax returns for the years 1973-77.[1] The jury convicted appellant of personal income tax evasion in violation of 26 U.S.C. § 7201[2] for the years 1973-77. On November 6, 1980, the district judge fined appellant $50,000 and sentenced him to prison for a total of thirty months.

Reduced to its simplest terms, the government's case against appellant consisted of evidence that he received "kickbacks" from the Florida Orange Juice Company (FOJC) which supplied his food store chain with orange juice. Appellant did not report these "kickbacks" as personal or corporate income. The controller for FOJC, Aron Kelton, testified that he drew disbursement checks to Farm Stores (appellant's business) on a regular basis.[3]

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[1]The government alleged violations of 26 U.S.C. § 7206(2).

[2]Section 7201 reads in pertinent part:

> Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[3]Frank Knight, the general manager of FOJC testified that he paid the "refunds" three times a month instead of once so that FOJC's bank account would not be hit with a huge expenditure at one time.

The amount of each check equalled the number of units of orange juice sold to Farm Stores since the last check, times an allowance or reimbursement figure.[4] Kelton personally delivered checks to Farm Stores' offices on two occasions when Frank Knight, the regular courier and the general manager of FOJC, was out of town. The checks were enclosed in envelopes marked "Farm Stores, attention Mr. Ed Fogg." Kelton further testified that the reimbursements sent to Farm Stores were labeled as "promotion" on FOJC's books. FOJC did not have this sort of arrangement with any of its other customers.

Frank Knight worked for FOJC from approximately 1951 until 1977. He explained the reimbursements as the result of appellant's apparent desire "to have more money to spend." Appellant asked Knight in the early 1970's if he could pay extra for orange juice and receive a refund from FOJC at the end of each month. Knight agreed. Knight always delivered the checks to appellant by hand. At appellant's request, each check was made payable to Farm Stores Processing, a division of Farm Stores.

John Rife, an accountant with Farm Stores, also testified for the government. Rife was specifically employed by Dairy Management Service, a partnership consisting of appellant and his brother. Rife testified that appellant gave him the first FOJC check, told him to give him cash for it, and stated that he planned "to use the money for legitimate business purposes." Thereafter, as he received FOJC checks from appellant, Rife deposited them to a bank account entitled Farm Stores, Inc., Milk Proces-

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[4]The reimbursement figure varied from 1¢ to 2.5¢ per unit.

sing Division. He testified that he sometimes handled the checks through an exchange or general ledger account by debiting the bank account and crediting the exchange account or petty cash. He would then have a check written to cash, disguising the entire transaction by making the opposite entries in each account. One of Rife's assistants cashed each check. Rife personally transferred the cash to appellant and kept only informal notes on the receipt of each check. He never recorded the amounts as business income to Farm Stores, admitting on the stand that he "used poor judgment in handling it that way."[5]

The government presented several other witnesses including the agent who conducted the audit of Farm Stores' 1975 and 1976 tax returns. In the course of that audit, the agent received documents indicating that appellant, because of his education and experience, was an expert accountant. Appellant's defense consisted of testimony by numerous character witnesses.[6] He did not testify in his own behalf.

Appellant contends that the government failed to construct a prima facie case of personal income tax evasion because it did not prove what Fogg did with the money after he received it from Rife. In his testimony, Rife stated that Fogg told him the money was to be used for "legiti-

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[5]Mildred Elkins, Rife's assistant, testified that she handled the FOJC checks in the manner described above when Rife was out of town. She cashed the checks and either gave the money to appellant or placed it in the cash box.

[6]These included the Mayor of Dade County, Florida, the President of the University of Miami, and the retired Bishop of the Episcopal Diocese of Southern Florida.

mate business expenses." The government's failure to contradict this hearsay statement, so the argument runs, indicates that the jury based its verdict of guilty on mere conjecture. The government argues that it presented substantial evidence of appellant's guilt, more than meeting its burden under 26 U.S.C. § 7201 and the pertinent case law. We agree with the government and affirm the lower court's refusal to grant appellant's motion for judgment of acquittal.

In *United States v. Hiett*, 581 F.2d 1199, 1200 (5th Cir. 1978), we cataloged and commented upon the elements of a Section 7201 violation:

> To establish a § 7201 violation, the government must prove (1) the existence of a tax deficiency, (2) an affirmative act constituting an evasion or attempted evasion of the tax due, and (3) willfulness. . . . To establish a tax deficiency, the government must show first that the taxpayer had unreported income, and second, that the income was taxable. (Citations omitted).

As did the appellant in *Hiett*, Mr. Fogg contends that the money he undisputably received from FOJC was not taxable income. *Hiett* maintained that the government failed to prove the existence of a taxable source[7] or the nonexistence of any nontaxable source[8] for his unreported income. In allowing the government to present testimony of an Internal Revenue agent that his extensive investiga-

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[7]*See Holland v. United States*, 348 U.S. 121, 138, 75 S.Ct. 127, 136-37, 99 L.Ed. 150 (1954).

[8]*See United States v. Massei*, 355 U.S. 595, 78 S.Ct. 495, 2 L.Ed. 2d 518 (1958).

tions revealed no possible nontaxable source for Hiett's extra income,[9] we noted that Section 7201 does not require the government "to prove a cosmic negative." *Id.* at 1201. To require the government in the instant case to disprove Fogg's accountant's meager recollection of Fogg's purported use of the money would be absurd. The government met its burden under the statute by demonstrating Fogg's receipt of unreported income and the existence of its taxable source.

Hiett also examines another issue raised by Fogg relating to the government's burden of proof. In *Hiett*, we affirmed the lower court's placement of the burden of proof on the defense to show that Hiett's expenditures were for business, not personal, purposes. *Id.* at 1202. It stated clearly that the burden of proving deductions is on the defendant. If Fogg contends that he used the money from FOJC for legitimate business expenses, he must prove it. He chose to remain silent at trial and allow the jury to draw inferences from the evidence without the benefit of his version of the facts.

Appellant goes to great lengths in his brief to distinguish the cases of *United States v. Lawhon*, 499 F.2d 352 (5th Cir. 1974), and *McClanahan v. United States*, 292 F.2d 630 (5th Cir. 1961). These cases are similar to *Hiett* because in each we refused to place the burden of proving the legitimacy of deductions upon the government. Fogg claims that his situation differs from that of *Lawhon* because he does not assert his right to off-setting deductions; rather, he refused to characterize the money he

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[9] *See United States v. Dwoskin*, 644 F.2d 418 (5th Cir. 1981).

received as income. The government's point in this regard is well taken. It contends that there is no real distinction between the basic arguments of Fogg and Lawhon. Neither appellant denied receiving money. Each offered a reason why he should not pay taxes on the funds. When the government in the instant case presented evidence indicating that the money received by Fogg was income to him, the court below properly submitted that question to the jury.

Internal Revenue Agent Tepper testified for the government as an expert IRS auditor and accountant. The prosecutor asked Agent Tepper to give his opinion of the tax treatment of the transactions in evidence. Agent Tepper stated that the payments to Fogg would be characterized as constructive dividends from the Farm Stores Corporation.[10] Without documentation, the Internal Revenue Code would not recognize expenditures as business expense deductions. Appellant emphasizes the impropriety

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[10]Q. [By Mr. Moore] Mr. Tepper, with respect to the checks to cash that were cashed and the proceeds given to the defendant in the same approximate amount of the Florida Juice checks that were put in and deposited to the Milk Processing account under generally accepted accounting principles, how would these amounts be reported on the taxpayer's individual return?

* * * [Objection]

THE COURT: The agent heard the testimony concerning this. If you can answer that question, I will let you go ahead.

THE WITNESS: Without any other evidence these monies would be considered constructive dividend [sic] to the taxpayer.

Q. [By Mr. Moore] And as a constructive dividend how would they be reported?

A. As dividend income.

Q. In your examination of the returns of the taxpayer Fogg, did you ever determine the amount of checks to petty cash [that]

of Agent Tepper's testimony because it was prejudicial and because it stated legal conclusions.

In *United States v. Bass*, 425 F.2d 161 (7th Cir. 1970), the court remanded the case for several reasons, the least of which was the government's attempt to prove the existence of income through the testimony of an Internal Revenue agent. The agent stated that certain corporate expenses of the appellant's corporation were improper and would be charged as income to appellant. *Bass* is easily distinguishable from the instant case because the government did not rely solely on Agent Tepper's testimony or

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were reported as constructive dividend [sic] on the return of the defendant?

A. These monies weren't reported on the return of the defendant.

Q. Mr. Tepper, assume the monies paid to the corporate officer were used for legitimate business expenses, how would they be treated on the books and records of the corporation?

A. That would depend on whose business expenses they are for.

Q. Assume further that they were for in this case the Farm Stores Corporation, how would they be treated?

A. Either as a deductible or nondeductible business expense.

Q. And if they were for a deductible business expense, how would they be treated?

A. They would have been charged to whatever expense it was for.

Transcript at 457-59.

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Q. Mr. Tepper, finally based on the testimony that you have heard and the books and records that you have examined, were you able to make a determination of whether these amounts that were being claimed as legitimate business expenses whether they were in fact reported as legitimate business expenses?

A. They weren't reported as legitimate business expenses.

Transcript at 462-63.

upon lack of documentation to establish receipt of income by Fogg. Fogg's counsel cross-examined Rife and elicited the statement that Fogg told him the money was for business purposes. The government took the opportunity to rebut this exculpatory evidence with the agent's testimony.

Moreover, the court below, in denying appellant's motion for a new trial, made several observations about *Bass*. First, the testimony of the agent was only a superfluous reason for remand. The court remanded the case mainly because of erroneous jury instructions. Second, we had not accepted *Bass's* teachings concerning expert testimony. Third, as of October 10, 1980, no court in any jurisdiction had cited *Bass* for the proposition urged by Fogg.

In contrast to *Bass*, it is well settled that " 'such expert testimony [that of an agent] is permissible in a tax evasion case, provided . . . that the expert testifies on the basis of facts in evidence.' " *United States v. Schafer*, 580 F.2d 774, 778 (5th Cir. 1978), *quoting, United States v. Johnson*, 319 U.S. 503, 519-20, 63 S.Ct. 1233, 1241, 87 L.Ed. 1546 (1943).[11]

Fogg also objects to Agent Tepper's testimony because in it he stated legal conclusions. Fogg specifically objects to the following statement: "Without any other evidence those monies [from FOJC] would be considered constructive dividend [sic] to the taxpayer." It appears to this Court that Agent Tepper merely stated his opinion as an accountant, and did not attempt to assume the role of the

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[11] *See United States v. Grote*, 632 F.2d 387, 390 (5th Cir. 1980); *United States v. Milton*, 555 F.2d 1198, 1203-04 (5th Cir. 1977).

court. Since the court below instructed the jury about the weight to be afforded expert testimony, Agent Tepper's statements were placed in the proper perspective. In *United States v. Milton*, 555 F.2d 1198, 1204 (5th Cir. 1977), a prosecution for conducting an illegal gambling business, we affirmed the lower court's admission of expert testimony although it appeared to be a legal conclusion. In reaching the decision to affirm, we considered the testimony in its context, the complexity of the case, and the correctness of the witness' statement. We also emphasized "the trial court's admonitions to the jury to accord no unusual deference to expert testimony and to take the court's instructions as the sole source of applicable law. . . ." *Id.*

When one compares Agent Tepper's testimony with that of the customs agent in *Huff v. United States*, 273 F.2d 56 (5th Cir. 1959), the correctness of the trial court's decision is apparent. The district court in *Huff* allowed the customs agent to state his interpretation of the customs laws, and apply it to the ultimate issue in the case. *Id.* at 61. We predicated our decision to reverse on numerous grounds other than the admission of prejudicial expert testimony. Moreover, *Huff* was decided before the liberalization of the Federal Rules of Evidence. Rule 704 now allows experts to state their opinions on the ultimate issue. Most important in comparing *Huff* with the instant case is the fact that Agent Tepper never couched his testimony as judicial instructions to the jury. He simply stated his opinion as an accountant. In this day and age, any accountant who lacks adequate knowledge of the tax laws is risking liability for malpractice.

Comments by a prosecutor upon the failure of a criminal defendant to testify in his own defense violate the defendant's fifth amendment rights and necessitate reversal.[12] We recently clarified this general rule in *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980):

> To reverse for improper comment by the prosecutor, we must find one of two things: that "the prosecutor's manifest intention was to comment upon the accused's failure to testify" or that the remark was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

Id. at 825, *quoting, United States v. Rochan*, 563 F.2d 1246, 1249 (5th Cir. 1977) (citations omitted).

The court, however, drew a distinction between a comment concerning "the failure of the *defense*, as opposed to the *defendant*, to counter or explain the evidence." 630 F.2d at 825 (citations omitted). A comment about the former did not violate the defendant's fifth amendment rights.

In his closing argument, appellant's counsel pleaded with the jury as follows:

> Now, my job is almost done. I have a very important job, too. I am in this courtroom to defend a man who has lived over sixty years as an outstanding man in his community, whose whole life is in jeopardy by reason of this criminal charge. I feel the awesome burden that I have. Suppose I don't do something that I should do and this innocent man is convicted. That's

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[12] *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *United States v. Chandler*, 586 F.2d 593, 603 (5th Cir. 1978); *United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978).

> why throughout I have tried to the best of my ability, with the assistance of my partner, to do everything I could do to make sure that only fair, straightforward evidence got to you.

In rebuttal to this appeal for sympathy, the prosecutor stated:

> Now, he says that somebody has put this man's life in jeopardy. A criminal case, Ladies and Gentlemen, this case is here for one reason and one reason only. It was this defendant who committed the acts that are uncontroverted. They have not been controverted by anything that Mr. Dittmar has brought out in his closing argument. It was the defendant that put himself into question, put his own liberty in jeopardy because there is no legitimate explanation. You didn't hear one legitimate explanation for that type of conduct.

It appears to this Court that the prosecutor merely commented upon the complete failure of the defense to rebut the government's case. Indeed, the trial court wrote in its order denying Fogg a new trial: "[T]he comments in question here neither show the required manifest intent, nor would they naturally and necessarily be taken to be a comment on the defendant's failure to take the stand." It is also obvious that appellant was not the only person who could have controverted the government's case against him.

As a final assault, appellant collects under the topic "Prosecutorial Misconduct" a myriad of offenses allegedly perpetrated against him. First, he complains that the prosecutor deprived him of the "shield of the grand jury" by failing to present live witnesses. The prosecutor read por-

tions of the transcripts of the testimony of witnesses before other grand juries[13] to the grand jury returning the original and the superseding indictments.[14] This is a bogus contention since the district court allowed the disclosure of the testimony taken before the other grand juries. This procedure was approved by this Court in *United States v. Malatesta,* 583 F.2d 748, 752-54 (5th Cir. 1978), *aff'd on other grounds en banc,* 590 F.2d 1379 (5th Cir. 1979). In his reply brief, appellant claims that the grand jury did not hear portions of Rife's testimony that might have altered the indictment returned against him. The government claims that it read "verbatim and without summary" the testimony of those witnesses "essential to the establishment of probable cause." After a thorough review of the record, we agree with the government. It would have served no purpose for the government to read testimony about appellant's alleged participation in a wiretapping operation to the grand juries investigating his alleged tax evasion.[15]

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[13]Farm Stores was previously investigated for wiretapping the telephone conversations of its employees. The results of these investigations were presented to grand juries. The prosecution read the testimony of certain witnesses at the wiretap hearings to the grand juries that indicted Fogg for tax invasion.

[14]The trial court dismissed the counts of the original indictment alleging that Fogg aided in the preparation of fraudulent corporate tax returns for lack of specificity. The prosecution, not wishing to try Fogg on only the counts charging preparation of fraudulent personal tax returns, obtained a superseding indictment from another grand jury.

[15]*See United States v. Ciambrone,* 601 F.2d 616, 623 (2d Cir. 1979) (prosecutor may exercise some discretion in choosing evidence to bring before grand jury as long as he does not mislead it); *United States v. Eucker,* 532 F.2d 249, 256 (2d Cir. 1976) (government not compelled to present all available witnesses to

Appellant also claims that the prosecution sought a superseding indictment on the counts alleging violation of 26 U.S.C. § 7606(2) even though it knew it lacked sufficient evidence to support these counts. The prosecution allegedly used these counts as a vehicle to present irrelevant and prejudicial evidence to the jury. This argument fails because, as the court below noted in its order denying appellant's motion for a new trial, the evidence of the kickback scheme was not only relevant but crucial to the charges of personal income tax evasion.

Appellant next claims that the government violated the teachings of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the Supreme Court reversed a state criminal conviction because the prosecution had withheld evidence which was favorable and material to the defense. Appellant in the instant case emphasizes the lower court's order that all *Brady* material be delivered to appellant by March 6, 1980. The government failed to supply some material until the day of trial. *Brady* only requires that the defense receive the materials prior tc trial. Appellant specifically claims that he did not know of certain statements made before the grand jury by Knight and Rife. As noted by the government and by this Court in *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980):

> Regardless of whether the request was specific or general, and regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evi-

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grand jury). *See also United States v. Cruz*, 478 F.2d 408, 412 (5th Cir. 1973) (appellate courts may not review sufficiency of evidence supporting indictment).

> dence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim. . . . In no way can information known and available to the defendant be said to have been suppressed by the Government. [Footnotes omitted].

Given appellant's close relationship with both Rife and Knight, his counsel could easily have obtained their statements.

Appellant objects to the prosecutor's use of the term "kickback scheme" to characterize appellant's transactions with FOJC. The prosecutor employed this term in his closing argument only.[16] At a time when the jury was absent from the courtroom, he asked the trial court's permission to use the term. In view of this Court's definition of "kickback" in *United States v. Porter,* 591 F.2d 1048 (5th Cir. 1979),[17] the use of the term in this context seems particularly apt.

Finally, appellant labels as prosecutorial misconduct certain comments made by the government in its sentencing memorandum and at Fogg's sentencing hearing. In the memorandum, the prosecutor stated that "for almost five years every person in this community who bought juice from the defendant's company was systematically overcharged." The government claims that this was merely a reasonable and permissible inference from the evidence. Appellant also objects to the mention of the wiretap investi-

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[16]Appellant also objected to the prosecutor's calling of a juror by name during the closing argument. Because the judge quickly gave a curative instruction, this is not grounds for reversal.

[17]"In ordinary parlance, a kickback is the secret return to an *earlier possessor* of part of a sum received." 591 F.2d at 1054.

gation of Farm Stores as an attempt to link Fogg with that illegal activity. The government never mentioned the wiretapping until appellant brought it out during the cross-examination of Rife in an effort to show that he was harassed. The government claims that mentioning the wiretapping was relevant because at the time the wiretap investigation began, the kickback scheme stopped. Even if these statements were improper, the prosecutor made them to the judge and not to the jury. After listening to what the court below termed "the overwhelming evidence" of guilt in Fogg's case, it is doubtful that the prosecutor's written and spoken remarks at sentencing made any difference in the severity of the sentence imposed.

AFFIRMED.

No. 80-5900

United States of America,
Plaintiff-Appellee,

versus

Edward Chambless Fogg, III
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion August 16, 1981, 5 Cir., 198...., ... F.2d .....).

(October 8, 1981)

Before HILL and VANCE, Circuit Judges, and LYNNE*, District Judge

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16, Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges

*Hon. Seybourn H. Lynne, Senior District Judge of the Northern District of Alabama, sitting by designation.

and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

Opposition

Office - Supreme Court, U.S.
FILED
MAR 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1264

In the Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD CHAMLESS FOGG, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this prosecution for attempted tax evasion, the courts below properly rejected petitioner's defense that the government had failed to establish that cash he concededly received as kickbacks was income to him.

2. Whether the prosecutor's closing argument to the jury was prejudicial to petitioner.

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A1-A16) is reported at 652 F. 2d 551.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1981. A timely petition for rehearing was denied on October 8, 1981. By order dated November 24, 1981, Justice Powell extended the time for filing a petition for a writ of certiorari to December 17, 1981. The petition was filed on December 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on five counts of personal income tax evasion, in violation

of 26 U.S.C. 7201, for the taxable years 1973 through 1977. The district court sentenced petitioner to 30 months' imprisonment and fined him $50,000 (Pet. App. A2). The court of appeals affirmed (Pet. App. A1-A16).

Petitioner is the president of Farm Stores, Inc., a food store chain that sells dairy products, citrus juice and sundry items at drive-in locations throughout southern Florida (Pet. 2). The evidence adduced at trial showed that petitioner received kickbacks from the Florida Orange Juice Company, which supplied his food chain with orange juice. Petitioner did not report these kickbacks as personal or corporate income. The controller for Florida Orange Juice, Aron Kelton, testified that he drew disbursement checks to Farm Stores on a regular basis. The amount of each check was determined by multiplying the number of units of orange juice sold to Farm Stores by an agreed upon figure.[1] Kelton personally delivered checks to Farm Stores' offices on two occasions when Frank Knight, the general manager of Florida Orange Juice, who ordinarily delivered the checks, was out of town. The checks were enclosed in envelopes marked "Farm Stores, attention Mr. Ed Fogg." Kelton further testified that the reimbursements sent to Farm Stores were labeled as "promotion" on Florida Orange Juice's books. Florida Orange Juice did not have this type of arrangement with any of its other customers (Pet. App. A2-A3).

Frank Knight worked for Florida Orange Juice from 1951 until 1977. He testified that the payments were made to satisfy petitioner's apparent desire "to have more money to spend." In the early 1970's, petitioner asked if he could pay an additional amount for orange juice and receive a refund from Florida Orange Juice at the end of each month.

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[1]The figure varied from 1¢ to 2.5¢ per unit.

Knight agreed with petitioner's proposal and always delivered the checks to petitioner by hand. At petitioner's request, each check was made payable to Farm Stores Processing, a division of Farm Stores (Pet. App. A3).

John Rife, an accountant with Farm Stores, was also employed by Dairy Management Service, a partnership consisting of petitioner and his brother. Rife testified that petitioner gave him the first Florida Orange Juice check, told him to give him cash for it, and stated that he planned "to use the money for legitimate business purposes." Thereafter, as he received the Florida Orange Juice checks from petitioner, Rife deposited them to a bank account entitled Farm Stores, Inc., Milk Processing Division. Rife testified that he sometimes handled the checks through an exchange or general ledger account by debiting the bank account and crediting the exchange account or petty cash. He would then have a check written to cash, disguising the entire transaction by making the opposite entries in each account. One of Rife's assistants cashed each check. Rife personally transferred the cash to petitioner and kept only informal notes on the receipt of each check. He never recorded the amounts as business income to Farm Stores, admitting during the trial that he "used poor judgment in handling it that way"[2] (Pet. App. A3-A4).

The government also presented the testimony of the revenue agent who conducted the audit of Farm Stores' 1975 and 1976 tax returns. In the course of that audit, the agent received documents indicating that petitioner, because of his education and experience, was an expert accountant. Petitioner's defense consisted of testimony by numerous

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[2]Mildred Elkins, Rife's assistant, testified that she handled the Florida Orange Juice checks in the same manner described above when Rife was out of town. She cashed the checks and either gave the money to petitioner or placed it in the cash box.

character witnesses. He did not testify in his own behalf (Pet. App. A4).

ARGUMENT

The court of appeals correctly rejected petitioner's claim that the government failed to establish a prima facie case of income tax evasion because it did not prove what he did with the kickback money after he received it from Rife.

1. Petitioner contends (Pet. 9-10) that the money he received was not personal income to him, and that Rife's testimony that petitioner told him that the money was to be used for "legitimate business expenses" was uncontradicted and hence must be believed. But this hearsay statement by Rife cannot control in the face of the substantial evidence of petitioner's guilt.

To establish tax evasion under Section 7201, the government must prove only (1) the existence of a tax deficiency, (2) an affirmative act constituting an evasion of the tax due, and (3) willfullness. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). To establish a tax deficiency, the government must show first that the taxpayer had unreported income, and second, that the income is taxable. *United States* v. *Hiett*, 581 F. 2d 1199, 1200 (5th Cir. 1978).

There is no question that petitioner had unreported income. Petitioner admittedly received approximately $80,000 per year from 1973 through 1976 as a result of "rebates" from Florida Orange Juice (Pet. 3). This fact alone is sufficient to indicate that the income was taxable. In these circumstances, the government is not required to disprove the possibility that the money was received by petitioner for another purpose that would render it not taxable. As the court stated in *Dillon* v. *United States*, 218 F. 2d 97, 98-99 (8th Cir. 1955):

> If the foundation or initial evidence does fairly indicate that the receipts were income, the Government is not required initially to adduce positive evidence to support a negative hypothesis that it was not money received for someone else or that it was not received for some purpose which would prevent it from being income to the person to whom it was paid.

Petitioner's "mere receipt" argument ignores his prior incriminating conduct that places his receipt of cash in its proper context. Here, the government presented substantial evidence that "fairly indicated" that the rebates were income. This evidence included the unorthodox manner in which petitioner solicited payments from his supplier (Pet. App. A3), petitioner's accounting background (Pet. App. A4), the manner in which the payments were made (Pet. App. A2-A3), the lack of any documentation to substantiate petitioner's claim of legitimate business expenses, and petitioner's unreported receipt of substantial sums of cash over a period of about five years (Pet. 3). Moreover, petitioner does not dispute that he had full and complete control over these funds. Such a payment "constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it. *Burnet* v. *Wells*, 289 U.S. 670, 678; *Corliss* v. *Bowers*, 281 U.S. 376, 378." *Rutkin* v. *United States*, 343 U.S. 130, 137 (1952).

It is therefore clear that the government met its burden of proving that petitioner knowingly received taxable income and willfully failed to report it. There is accordingly no basis for petitioner's argument (Pet. 11-13) that the trial court relieved the government of its constitutional duty to prove a prima facie case by placing the burden on petitioner to prove that he expended the funds for the claimed legitimate business expenses. Since that claim constituted petitioner's defense, he was obliged to introduce evidence to support it if

it was to be considered. His failure to do so provided the jury with an ample basis to return a guilty verdict.

2. Petitioner further claims (Pet. 11-13) that the trial court erred in permitting the prosecutor to make a closing argument to the jury that invited it to draw an adverse inference from his failure to testify.

It is, of course, settled that the government may not comment on a defendant's failure to testify. *Griffin* v. *California*, 380 U.S. 609, 614 (1965); *Stewart* v. *United States*, 366 U.S. 1 (1961). But "[t]o reverse for improper comment by the prosecutor, we must find one of two things: that 'the prosecutor's manifest intention was to comment upon the accused's failure to testify' or that the remark was 'of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " *United States* v. *Rochan*, 563 F. 2d 1246, 1249 (5th Cir. 1977). Accord: *United States* v. *Bright*, 630 F. 2d 804, 825 (5th Cir. 1980).

Neither of these conditions was met in this case. Here, the prosecutor commented on the failure of the defense, as opposed to the defendant, to counter or explain the evidence. In his closing argument, petitioner's counsel stated (Tr. 700):

> Now, my job is almost done. I have a very important job, too. I am in this courtroom to defend a man who has lived over sixty years as an outstanding man in his community, whose whole life is in jeopardy by reason of this criminal charge. I feel the awesome burden that I have. Suppose I don't do something that I should do and this innocent man is convicted. That's why throughout I have tried to the best of my ability, with the assistance of my partner, to do everything I could do to make sure that only fair, straightforward evidence got to you.

In rebuttal to this appeal for sympathy, the prosecutor stated (Tr. 722):

> Now, he says that somebody has put this man's life in jeopardy. A criminal case, Ladies and Gentlemen, this case is here for one reason and one reason only. It was this defendant who committed the acts that are uncontroverted. They have not been controverted by anything that Mr. Dittmar has brought out in his closing argument. It was the defendant that put himself into question, put his own liberty in jeopardy because there is no legitimate explanation. You didn't hear one legitimate explanation for that type of conduct.

A fair reading of the above-quoted excerpts demonstrates that the prosecutor's comment did not reflect a manifest intention to comment on petitioner's failure to testify. Nor could such a comment naturally and necessarily be taken by the jury as a comment on the petitioner's failure to testify. The court of appeals therefore viewed the statement as comment upon "the complete failure of the defense to rebut the government's case" (Pet. App. A12). Accordingly, the comment was entirely proper. *United States* v. *Dearden*, 546 F. 2d 622, 625 (5th Cir.), cert. denied, 434 U.S. 902 (1977); *United States* v. *Bright*, *supra*, 630 F. 2d at 825; *Smith* v. *United States*, 234 F. 2d 385 (5th Cir. 1956). See also *United States* v. *Goodwin*, 470 F. 2d 893, 900 (5th Cir. 1972), cert. denied, 411 U.S. 969 (1973).[3]

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[3]Petitioner also argues (Pet. 17) that the Court should clarify the burden of proof in tax evasion cases, and the relationship of self-incrimination considerations to proof beyond reasonable doubt. But the Court has already done so. See, *e.g.*, *Holland* v. *United States*, 348 U.S. 121 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1264

In the Supreme Court

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United States

OCTOBER TERM, 1981

EDWARD CHAMLESS FOGG, III,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Apart from its artful misrepresentation of the evidence, the Government ultimately relies upon the preposterous proposition accepted by the court below: that one who is in possession and control of corporate funds has received personal income (Govt. Br. 5).

1.

Challenged to produce a decision supporting the judgment below (pet. 8), the Government produces *Dillon v. United States*, 218 F.2d 97 (8th Cir. 1955), *Burnet v. Wells*, 289 U.S. 670 (1933), *Corliss v. Bowers*, 281 U.S. 376 (1930), and *Rutkin v. United States*, 343 U.S. 130 (1952). (Govt. Br. 4-5). Two of those decisions, however, were civil cases holding that income of a trust was taxable to the settlor.

The other two, though relevant, are starkly different. In *Dillon v. United States*, the court held that the Government's *prima facie* burden had been met by proof that the defendant received $5,700 in excess of receipts reported on his return where the defendant, a lawyer, had received the sums in checks payable to and cashed by him. Of the seven checks, two were marked "legal services", two were marked "fees", and three were received "under circumstances indicative that they were for legal services." 218 F.2d at 100. Moreover, two of the checks were not reflected in defendant's records and four were understated therein (checks totalling $8000 were entered as $3000). Although considering it a close case, the 8th Circuit held that the evidence "fairly indicate[d]" unreported income. In *Rutkin v. United States*, a bare majority of this Court held that $250,000 extorted by one bootlegger from another was income. The defendant received the money for his personal use, used it personally (*e.g.* to pay off personal loans), and did so pursuant to a claim of personal ownership and without any acknowledged obligations or responsibilities concerning use of the money.

In the present case, although the Government repeatedly characterizes the payments from Florida Juice to Farm Stores as "kickbacks", the evidence *adduced by the Government* clearly showed that all parties understood that the money was the property of Farm Stores. It was, first of all, a refund of money which had been paid by Farm Stores to Florida Juice. The payments of the refunds came about because of a conversation between petitioner and the general manager of Florida Juice wherein petitioner initially

requested a greater allowance for orange juice promotion: "he seemed to want to have more money to spend than he had been having for it" (Knight Tr. 16). Petitioner's requests were plainly made in his capacity as board chairman of Farm Stores and on Farm Stores' behalf.

The refunds, moreover, were paid to Farm Stores by checks, cashed by Farm Stores, and recorded in Farm Stores' books (as well as the books of Florida Juice). Contrary to the Government's claim, nothing was done by anyone which can fairly be characterized as "disguising the entire transaction." (Govt. Br. 3). Petitioner made no effort to make it appear that the transaction had not occurred. How the matter was handled on the books of Florida Juice or Farm Stores was entirely up to others. Farm Stores' vice-president in charge of financial affairs, John Rife, decided entirely on his own, without any discussion with petitioner, how to handle the matter on Farm Stores' books and the tax returns of Farm Stores and petitioner, both of which Rife prepared (Rife Tr. 60, 96). Indeed, concerning the entire matter, Rife was never told to do anything other than to report honestly and correctly, which he attempted to do (*Id.* at 142-43), and which he still thought he had done (*Id.* at 147-148).

There is, in short, no evidence that petitioner ever asserted any intent to use any of the money for his personal benefit, nor a sprig of evidence that he did so. On the contrary, all the evidence is of an intent to use the money for the legitimate expenses of Farm Stores.

2.

The Government ignores points b. and c. of the petition by converting them into a single claim that the prosecution unfairly commented on petitioner's failure to produce evidence of his innocence. Even on this point, however, the Government ignores petitioner's argument, and the law supporting it, that a prosecutorial comment on failure of the *defense* to explain the prosecution's case is prohibited where it is clear, as here, that the only person who could explain would be the accused.

The Government made no case which required explanation. It never proved that petitioner had unreported income. All it proved was that petitioner had custody of corporate funds. To hold that this constitutes a *prima facie* case is to ignore the Fifth Amendment as well as the Due Process Clause.

Respectfully submitted,

March, 1982

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